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SURETYSHIP AND THE STATUTE OF FRAUDS

The New York Personal Property Law, section 31, provides that "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: * * * (2) Is a special promise to answer for the debt, default or miscarriage of another person." This is in substance the same as the original statute of frauds and is typical of the statutes in the other states of the union.¹ If a strict and literal interpretation had always been put upon the language of the statute, its application would not be difficult. We should then have only to distinguish promises to answer for the debts of others, from promises which come into some relationship with debts of others, but are not promises to answer for such debts.

One example of this latter class is a case where Jones and Smith assume a joint obligation to pay for goods supplied to Jones, and where Smith is in fact Jones's surety, with the consequent right of reimbursement in case of payment. In such a case Smith may not successfully plead the statute of frauds since the debt is his as well as Jones's, and his obligation is, therefore, to pay his own debt.²

Another example is a case where, Jones being indebted to Williams, Smith agrees to pay Williams what Jones owes, if Williams will discharge Jones, and Williams does.³ Smith's promise is not in this case to pay Jones's debt, for Jones is no longer indebted, and Smith's promise does not, therefore, come within the terms of the statute.⁴

¹"No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; unless the agreement upon which action shall be brought, or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto lawfully authorized by him." 29 Car. 2, c. 3, § 4. As to the statutes in the other states, see Stearns, *Suretyship* (2nd ed.) § 25.

²*Perkins v. Goodman* (N. Y. 1855) 21 Barb. 218; *Ward v. Hasbrouck* (1902) 169 N. Y. 407, 62 N. E. 434; *Gibbs v. Blanchard* (1867) 15 Mich. 292; Stearns, *op. cit.*, § 37. For a statement of the opposing view see Throop, *Validity of Verbal Agreements*, 282 to 298.

³See an article on Novation by Professor Ames, 6 *Harvard Law Rev.* 184.

⁴*Roe v. Hough* (1703) 1 Salk. 29; *Meridan Britannia Co. v. Zingsen* (1872) 48 N. Y. 247.

A third example is an indemnity contract. If Smith agrees with Williams that he will indemnify Williams for any loss which Williams may suffer from injury to his person or property, or from an obligation which he assumes, such agreement is, of course, generally unaffected by section 31 of the New York Personal Property Law, or any other similar provision. And it makes no difference that Jones is also obligated to indemnify Williams, and that the fulfilment of Jones's obligation will relieve Smith from liability on the obligation assumed by him. Such a case is where Jones wishes Williams to become his guarantor and Smith promises to indemnify Williams for any loss suffered if he becomes such guarantor. In such a case Smith's promise is not to answer for Jones's default, but to indemnify Williams, and the fact that the protection obtained by Williams is similar to that which he would have obtained if Smith had promised to pay if Jones did not, does not bring the statute into play.⁵

A fourth example is a promise made by Smith to Jones to pay a debt owed by Jones to Williams. It is properly held that when the statute speaks of a promise to answer for the debt, default or miscarriage "of another person", it does not mean of a person other than the promisor, but it means of a person other than the contracting parties.⁶ It follows that if Williams sues Smith, not on any promise made to him by Smith, but (in a jurisdiction where a beneficiary may sue) as beneficiary of the contract between Smith and Jones, the statute of frauds is no defense.⁷

A fifth example is where a third person contracts with the

⁵*Chapin v. Merrill* (N. Y. 1830) 4 Wend. 657; *Jones v. Bacon* (1895) 145 N. Y. 446, 40 N. E. 216. And see *Guild & Co. v. Conrad* (1894) 2 Q. B. 885. Some American jurisdictions dissent from this view. See the full collection of cases in 6 Ann. Cas. 671 note.

⁶*Eastwood v. Kenyon* (1840) 11 Ad. & E. 438; *Tighe v. Morrison* (1889) 116 N. Y. 263, 22 N. E. 164; *Stearns, Suretyship* (2nd ed.) § 31.

⁷*Eddy v. Roberts* (1856) 17 Ill. 505; *Mason v. Hall* (1857) 30 Ala. 599; *Wood v. Moriarty* (1887) 15 R. I. 518, 9 Atl. 427; *Barker v. Bucklin* (N. Y. 1846) 2 Denio 45; and see *Lawrence v. Fox* (1859) 20 N. Y. 268 and *Barker v. Bradley* (1870) 42 N. Y. 316, where recovery by the beneficiary was allowed on an oral promise, it being apparently considered that if a beneficiary can sue, the statute is no defense, though the point was not discussed. *Contra Clapp v. Lawton* (1862) 31 Conn. 95; *Shoemaker v. King* (1861) 40 Pa. 107. Three cases in the lower courts of New York have, without any comment dealt with actions by the beneficiaries as actions to which the statute is applicable, but in each instance the case was held to be taken out of the statute, because of the beneficial consideration. *Sternwald v. Siegel* (1894) 7 Misc. 70, 27 N. Y. Sup. 375; *King v. Israel* (1897) 19 Misc. 159, 43 N. Y. Sup. 306; *Lyon v. Clochessy* (1904) 43 Misc. 67, 86 N. Y. Sup. 245.

creditor for the assignment to him by the creditor, for a price agreed upon, of his chose in action against the debtor. This clearly is not a promise to answer for the debt of another, but to buy a right against a debtor, and so is not within the statute.⁸

It was early decided, that if property was delivered to Jones solely upon Smith's promise to pay, Smith would be liable in an action of debt, and later of *indebitatus assumpsit*,⁹ but that if property was delivered to Jones so that Jones was obligated to pay for it, although Smith at the same time promised to see that the vendor was paid, Jones was the only one against whom debt or *indebitatus assumpsit* would lie, and Smith could only be sued in special assumpsit.¹⁰ After the passage of the statute of frauds it was held to follow that if Jones was liable in debt under such a transaction for property delivered to him, Smith's promise was a promise to answer for Jones's debt, even though the property had been delivered principally upon Smith's credit, and that Smith's promise, therefore, fell within the statute.¹¹ The test in such cases is as to whether the goods are delivered to Jones at all upon the credit of his express or implied promise to pay for them, or wholly upon the credit of Smith's promise.¹² This is a question of fact. A promise on Smith's part that "I will pay if Jones does not", or that "I will see you paid" if goods are delivered to Jones, or a promise of similar tenor, raises a rebuttable presumption that credit is also given to Jones, and that Smith's promise is, therefore, to answer for Jones's debt;¹³ while a promise on Smith's part that

⁸Castling v. Aubert (1802) 2 East 325; Anstey v. Marden (1804) 1 Bos. & Pul. (N. R.) 124; Hayward v. Gunn (1876) 82 Ill. 385; Conger v. Cotton (1881) 37 Ark. 286; Stillman v. Dresser (1901) 22 R. I. 389, 48 Atl. 1; Meriden Britannia Co. v. Zingsen (1872) 48 N. Y. 247.

⁹Stonehouse v. Bodvil (1663) T. Raym. 67, 1 Keb. 439; Ambrose v. Rowe (1685) 2 Show. K. B. 421; Jordan v. Tompkins (1703) 2 Ld. Raym. 982.

¹⁰Alford v. Eglishfield (1564) 2 Dyer 230b, pl. 56; Ward v. Coggin (1647) Styles 6; Mines v. Schulthorpe (1809) 2 Comp. 215.

¹¹Watkins v. Perkins (1702) 1 Ld. Raym. 224; Matson v. Wharam (1787) 2 Term. R. 80. See an article entitled "Parol Contracts Prior to Assumpsit", 8 Harvard Law Rev. 252, 263 to 264, by Professor Ames. The cases in this and the two preceding notes are very excellently arranged for historical treatment in Henning's Cases on Suretyship in the American Case Book Series.

¹²See the interesting consideration of the subject in Throop, Validity of Verbal Agreements, Chap. VI. Also Simpson v. Penton (1834) 2 C. & M. 430, 4 Tyrewhitt 315; Pearce v. Blagrove (1855) 3 Com. L. R. 338.

¹³Peckham v. Faria (1781) 3 Doug. 13; Watkins v. Perkins (1702) 1 Ld. Raym. 224; Matson v. Wharam (1787) 2 Term. R. 80; Master v. Marriott (1694) 1 Lev. 363; Simpson v. Penton (1834) 2 C. & M. 430, 4 Tyrewhitt 315; Brown v. Bradshaw (1852) 1 Duer 199.

"I will pay for the goods delivered to Jones" raises a presumption that credit is alone given to Smith, and that his promise is, therefore, not a promise to answer for Jones's debt, which may be rebutted by showing that credit was also in fact given to Jones.¹⁴

The situation would seem to be simpler where Jones is already indebted to Williams, and Smith promises to pay the debt, Jones's obligation continuing to exist side by side with Smith's obligation. Here Smith's promise in whatever terms it may be couched, is clearly a promise to answer for the debt of another.

Courts, however, have held that promises may be within the apparent letter of the statute and yet not within its spirit. These cases are now to be considered.

A *del credere* agency is one where an agent, in consideration of a commission higher than he would otherwise obtain, guarantees the payment by those to whom he sells under his agency. It is universally conceded that his promise does not fall under the statute of frauds.¹⁵ In the early cases this seems to be put on the ground that the *del credere* agent is in substance the debtor to whose obligation that of the purchaser is later added.¹⁶ But, of course, this is in fact not true. "The true engagement of the factor, in such cases, is merely to pay the debt, if it is not punctually discharged by the buyer. In legal effect he warrants or guarantees the debt, and thus he stands more in the character of a surety for the debt, than as a debtor. Hence it is well established, that he is not liable to pay the debt, until there has been a default by the buyer."¹⁷ Professor Henning explains these cases as merely recognizing, though sometimes darkly, that the factor's promise is only a promise to account in a certain way, and that a bailee's promise to account was not a *special* promise as that term was understood when the original statute of frauds was adopted.¹⁸

¹⁴Anderson v. Hayman (1789) 1 H. Bl. 120; Croft v. Smallwood (1793) 1 Esp. 121; Pearce v. Balgrave (1855) 3 Com. L. R. 338; Briggs v. Evans (N. Y. 1851) 1 E. D. Smith 192.

¹⁵Huffcut, Agency, § 96; Brandt, Suretyship and Guaranty, § 82; Stearns, Suretyship (2nd ed.) § 44.

¹⁶Grove v. Dubois (1786) 1 Term. R. 112; Bize v. Dickarson (1786) 1 Term. R. 285; Swan v. Nesmith (1828) 7 Pick. 220; Leverick v. Meigs (N. Y. 1824) 1 Cow. 645; Wolff v. Koppel (N. Y. 1843) 5 Hill 458, affirmed (1845) 2 Denio 368.

¹⁷Story, Agency (5th ed.) § 215; Thompson v. Perkins (1823) 3 Mason 232; Gindre v. Kean (1894) 7 Misc. 582, 28 N. Y. Sup. 4.

¹⁸New and Old Readings of the Fourth Section of the Statute of Frauds, 57 Univ. of Pa. Law Rev. and Amer. Law Reg. 611, 632. Compare Throop, Validity of Verbal Agreements, § 668.

Another ground upon which the *del credere* agent's promise has been excepted from the operation of the statute of frauds is that, though it is a promise to answer for the debt of another, the principal object to be accomplished by force of the contract is the establishment of the relationship of principal and agent between the contracting parties, to which the promise to answer for the purchasers' debts is merely incidental.¹⁰

¹⁰*Couturier v. Hastie* (1852) 8 Exch. 40, 55 (reversed on other grounds) (1853) 9 Exch. 102, affirmed (1856) 5 H. of L. Cas. 673; *Harburg India Rubber Comb Co. v. Martin* [1902] L. R. 1 K. B. 778, 786, 790, 793; *Thropo, Validity of Verbal Agreements*, § 679. The view of the early cases is followed in *Lewis Bros. & Co. v. Brehme* (1870) 33 Md. 412, where it is said that the *del credere* agent is liable to the principal as debtor, and so his promise is not within the statute of frauds. In *Sherwood v. Stone* (1856) 14 N. Y. 267, the court held that a *del credere* agent's promise does not fall within the statute. *Johnson, J's.*, short opinion is placed on the principle of *stare decises*; *Mitchell, J.*, put his concurrence largely on the same ground, but also suggested that the agent was substantially the purchaser of the debt owed by the buyer, for which his promise was exchanged. The court of appeals has not since spoken on the subject. There is a *dictum* to the effect that a *del credere* agent is not a guarantor in *Cartwright v. Greene*. In *Schwab v. Elias* (1882) 2 N. Y. Civ. Pro. 340, plaintiff, a salesman, was suing his employer for the agreed compensation. One of the defenses was that plaintiff "was to be liable for the payment of debts thus incurred by customers." The trial judge charged the jury that this agreement if oral was void under the statute of frauds. The New York Marine Court, General Session, held "that the agreement in question, if the verdict of the jury had found that it was made even orally, was clearly an original contract between the parties to this action. It was a substantial and essential part of the consideration; in no sense a collateral undertaking, but on the part of the employed, direct and immediate, and founded upon consideration—i. e. the employment—moving between the parties themselves. We are of the opinion that this charge was in the particular erroneous." Here the determination of the court that the agent's promise did not fall within the statute of frauds was not based upon the proposition that the agent was the debtor, but that his promise to answer for the debt of another was "original" and not "collateral", because of the "consideration—i. e. the employment—moving between the parties themselves." The same idea seems to be the basis of the decisions that the statute of frauds does not apply to *del credere* agencies in *Osborne & Co. v. Baker* (1885) 34 Minn. 307, 25 N. W. 606, and *Bullowa v. Orgo* (1898) 57 N. J. Eq. 428, 41 Atl. 494; in the former the court said, "such a *guaranty* is an original one entered into in performance of the *guarantor's* own responsibility and in no sense a special promise to pay the debt of another within the meaning of the statute of frauds." In the latter case the court said, "This makes the contract an original one between Orgo and the complainants in consideration of a benefit and advantage to him, Orgo therefor." The term "original promise" as used in discussions of the statute of frauds is not used as antithetical to a promise to answer for another's debt, but as descriptive of those promises to answer for others debts which do not fall within the spirit of the statute because of special facts in the case. See an attempted definition in 20 Cyc. 163. In *Suman v. Inman* (1878) 6 Mo. App. 384, 386, the court said, "The rule that in the case of factors who have possession of the goods, and sell under a *del credere* commission, the agreement is not collateral and, therefore, not within the statute, is now too well established to be disturbed. . . . The factor's promise stands upon the consideration of his own duty and responsibility growing out of his employment. If it

If Smith is indebted to Jones and Jones procures goods on credit from Williams upon Smith's promise to Williams to pay him what he owes to Jones, to be applied in liquidation of Jones's debt, Smith's promise would seem not to fall within the terms of the statute, being not a promise to answer for another's debt, but a promise to pay his own preëxisting debt to the person designated by his creditor. The fact that the result will be to discharge Jones from a debt owed by Jones to Williams does not change the nature of Smith's obligation.²⁰ But if Jones is indebted to Williams and deeds to Smith a farm upon Smith's promise that he will pay Jones's debt, and then Smith promises Williams to pay Jones's debt if Williams will forbear to sue Jones for a period named, Smith's promise to Williams is literally a promise to answer for the debt of another. And yet such a promise has been held not to fall within the spirit or intent of the statute, because as between the original debtor and the promisor the latter has become primarily liable, and because, therefore, the primary object to be attained by force of the contract between the promisor and the original creditor is the fulfilment of the promisor's preëxisting obligation assumed to the original debtor; the fact that the object is attained by what is in form a promise to pay the original debtor's debt does not control.²¹

terminates in a liability to pay the debt of another, that is a mere incident; and one ought not to set up the statute as a pretext to escape the performance of a valid verbal promise for another purpose because in performing it the discharge of another's debt is incidentally involved."

In *Sutton & Co. v. Grey* [1894] 1 Q. B. 285, the doctrine of *Courturier v. Hastie*, *supra*, was applied to the case where defendant contracted to obtain clients for plaintiff, a stock broker, the defendant to receive half of the commissions and to bear half the losses. Plaintiff sued for half the amount due from a certain client. It was held that the statute of frauds did not apply because the main object and result of the contract was the formation of the relationship of principal and agent between the parties.

²⁰"The fact that the fulfilment of his promise will discharge the debt of his original creditor is wholly immaterial; for that relates only to the disposition of the moneys, to be paid to him in discharge of his own indebtedness." *Throop, Validity of Oral Agreements*, § 509; *Hodgson v. Anderson* (1825) 3 B. & C. 842; *Phillips v. Gray* (N. Y. 1854) 3 E. D. Smith 69; *Gallagher v. Nichols* (1875) 60 N. Y. 438. *Stearns on Suretyship*, § 42; *Brandt, Suretyship and Guaranty*, § 77. Some confusion crept into the English cases through the recognition in some of them of the doctrine that such a promise does not constitute an enforceable contract unless the intermediate debts are discharged at the time of the promise. See for instance *Wharton v. Walker* (1825) 4 B. & C. 163; but *cf.* the opinion of *Martin, B.*, in *Liversidge v. Broadbent* (1859) 4 Hurl. & Norm. 603.

²¹*Todd v. Tobey* (1848) 29 Me. 219; *Calkins v. Chandler* (1877) 36 Mich. 320; *Tuttle v. Armstead* (1885) 53 Conn. 175, 22 Atl. 677; *Skinker v. Armstrong* (1890) 86 Va. 1011; *Keyes & Co. v. Allen & Maynard* (1893) 65 Vt. 667, 27 Atl. 319; *Green v. Hadfield* (1894) 89 Wis. 138, 61 N. W. 310; *First Nat. Bank v. Chalmers* (1895) 144 N. Y. 432, 39 N. E. 331.

A similar situation arises where a debtor turns over to a third person property out of which such third person promises to pay the debtor's debts, and the third person later promises one of the transferor's creditors to apply the proceeds of such property to the payment of the debt due to him if he will forbear to sue the debtor. Here, literally, there is a promise to answer for the debt of another, but it is generally held not to fall within the statute, on the same reasoning as that stated in connection with the class of cases just discussed.²² But this position is somewhat qualified in New York. In 1878 the New York Court of Appeals in *Belknap v. Bender*²³ had before it a case where a debtor turned over to defendant certain property, from the proceeds of which the latter promised to pay certain of the transferor's creditors, including the plaintiff. Later the defendant promised plaintiff to pay his debt, upon the plaintiff's agreeing to continue to work for the defendant at the wages previously paid him by the debtor. The court said that the plaintiff's promise did not furnish consideration for defendant's promise to pay the debt of another, and that the defendant could not become bound to pay to plaintiff the debt due him by any verbal promise. But the court said that "if, in this case, Bender had converted the property into money, and then promised the plaintiff to pay the debt, he could have been sued directly on the promise. That would have been an original promise to discharge his own obligation to the plaintiff." In 1885, in *Ackley v. Parmenter*,²⁴ a case substantially like *Belknap v. Bender*, the New York Court of Appeals said that "where the obligation of the assignee, under his arrangement with the assignor, is to pay a creditor of the latter out of the proceeds of the assigned property, the duty to pay does not arise until such proceeds have been realized, and a promise to the creditor before that time to pay his claim is within the statute of frauds. Consequently at the time of the alleged promise he (the defendant) was under no present duty to pay, and the promise, though founded on good consideration (viz. the adjournment of the sale) was nevertheless an undertaking to

²²*Andrews v. Smith* (1835) 2 C. M. & R. 627; *Goodwin v. Bowden* (1867) 54 Me. 424; *Smith v. Exchange Bank* (1885) 110 Pa. 508, 1 Atl. 760; *Rounsevel v. Osgood* (1895) 68 N. H. 418, 44 Atl. 534. See a New and Old Reading on the Fourth Section of the Statute of Frauds, by Professor C. D. Hening, 57 Univ. of Pa. Law Rev. and Amer. Law Reg. 611.

²³(1878) 75 N. Y. 446. And see the earlier case of *Jackson v. Raynor* (N. Y. 1815) 12 Johns. 290.

²⁴(1885) 98 N. Y. 425.

pay the debt of another, and was void under the statute of frauds." The difference taken in these last two cases is that between an assignee's promise to fulfil his trust *when the time shall come* for the fulfilment, and the promise to fulfil his trust, *the time having come* for its fulfilment. In each case the purpose of his promise is the fulfilment of his trust, and therefore, though in each case, he promises to pay another's debt, this is incidental to the main object to be accomplished by his promise. There seems no very satisfactory reason for the distinction insisted upon, and it is not referred to in cases in other jurisdictions holding that a promise to pay another's debt, out of property delivered to the promisor for that purpose, is not within the statute of frauds.²⁵ Furthermore, the decisions in *Belknap v. Bender* and *Ackley v. Parmenter* seem inconsistent with the position of the New York court,²⁶ that, when Jones is indebted to Williams, and Smith will under an existing contract become indebted to Jones, Smith's promise to Williams to pay to him an amount *to become due* from Smith to Jones, is not within the statute of frauds.²⁷

It was decided by the court of King's Bench, in 1766, in the case of *Williams v. Leper*²⁸ that where a person holds goods as assignee for creditors, and the debtor's landlord is about to distrain them for rent, and the defendant promises to pay the rent if the landlord will desist, which he does, such promise is not within the statute of frauds. The case seems to have gone partly on the ground that the promise was to pay out of a fund furnished by the debtor, but partly on the ground that the creditors gave up to the defendant a lien on the property owned by the defendant or in which the defendant had an interest, and that since the object of the contract was to obtain the surrender of that lien, the promise to

²⁵See the cases referred to in note 19, *supra*. In *Andrews v. Smith*, the funds had not yet come into defendant's hands and in *Smith v. Exchange Bank*, defendant had not yet realized on the property assigned to him, at the time of his promise.

²⁶*Roussel v. Mathews* (1901) 62 App. Div. 1, 70 N. Y. Sup. 886; affirmed without opinion (1902) 171 N. Y. 634, 63 N. E. 1122. To same effect is *Calkins v. Chandler* (1877) 36 Mich. 320.

²⁷In the cases discussed in the last paragraph the creditor might be successful in an action in equity to enforce the trust in his favor without resorting to the promise to himself. *Lucas v. Payne* (1857) 7 Cal. 92. Or he might in the cases discussed in the last two paragraphs sue as beneficiary of the original contract between the debtor and the third person, pointed out above. See an excellent note on the New York doctrine as to the right of a beneficiary to sue, in 4 Cornell Law Quart. 53.

²⁸(1768) 3 Burr. 1886, 2 Wils. 308.

pay a third person's debt was not within the statute. It has been so interpreted by a number of later English cases.²⁹ A similar rule is now well established in this country, namely that when the defendant has promised to pay the debt of another in order to procure from the creditor the surrender of a lien on the property owned at the time by the defendant, his promise is not within the statute of frauds.³⁰

In 1902 the English Court of Appeal had before it the case of *Harburg India Rubber Comb Co. v. Martin*.³¹ The facts were that the plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The syndicate did not pay what was due from them for the goods, the plaintiffs recovered judgment against them, and placed a writ of *fiery facias* in the hands of the sheriff to realize the amount of the judgment. The defendant then had an interview with the plaintiffs' agent, and promised to indorse two bills of exchange, each for half the amount of the debt, if the plaintiffs would withdraw the writ; this the plaintiffs did. The defendant had largely financed the syndicate. At the trial judgment was rendered for the plaintiff, on the ground that the object of the defendant's promise was to protect the goods of the syndicate, and for the purpose of obtaining a direct personal advantage for himself, because if the *fiery facias* had been levied he would have lost all the money he had invested in the syndicate. The judgment for the plaintiffs was reversed in the Court of Appeal, opinions being written by Lords Justices Vaughan, Williams, Stirling, and Cozens-Hardy. The following quotation is part of Vaughan William's opinion which is a particularly able analysis of the subject, and statement of the principle which the court applied:

"Our attention has been called to a great number of cases in which the court has treated various transactions as being outside s. 4. Most of the earlier cases are what I may call 'property cases'.

²⁹*Castling v. Aubert* (1802) 2 East 325; *Edwards v. Kelly* (1817) 6 M. & S. 204; *Fitzgerald v. Dressler* (1859) 7 C. B., N. S. 374.

³⁰*Nelson v. Boynton* (Mass. 1841) 3 Metc. 396; *Mallory v. Gillet* (1860) 21 N. Y. 412 (but see the later New York cases discussed below in this article); *Corkins v. Collins* (1868) 16 Mich. 478. Some early English cases, such as *Houlditch v. Milne* (1800) 3 Esp. 86, did not distinguish between surrender by the promises of a lien to the promisor and to the debtor, and some American cases have failed to make that distinction, see 20 Cyc. 193, and cases cited; *Throop*, *Validity of Verbal Agreements*, § 603n; Bacon, J.'s, dissenting opinion in *Mallory v. Gillet*, *Ibid*.

³¹[1902] 1 K. B. 778.

They were cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire. It is not necessary for me to go through those cases, but I cannot agree that the present case comes within any of that class. The defendant's promise was not, as it seems to me, either a new contract of purchase, or a new contract for the release of any property which either was his or in which he had an interest.

"Our attention was next called to the exception which has been established by what I may call the 'del credere cases', beginning with *Couturier v. Hastie*,³² and coming down to *Sutton v. Grey*.³³ It has been said, and I think truly, that these cases are of a different species from the property. I say of a different species, not of a different genus, because I think there is a wider genus, which can be plainly and simply defined, within which both of these species fall. So far as I can see the authorities have left us with the general rule, which I will attempt to define presently, and each of these two classes of cases falls within the general rule. In each of them, I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but, whether he does so or not, it is the substance, not the form, which is regarded.

"Before leaving these instances I wish to mention one other class, which I do not treat as an exception from s. 4, but which, I think, does not come within the section at all. I mean the cases which have been spoken of as 'indemnity cases'.³⁴

"I will now go back to those cases which, so far as the words of the contract are concerned, might come within s. 4, but which have been held not to come within it because of the object of the contract. Whether you look at the "property cases" or the "del credere cases", it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of these cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. *As I understand these cases, it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject matter of the contract?*³⁵ If the subject matter was the purchase of the property—the relief of the property from liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office—in all these cases there

³²(1852) 8 Exch. 40.

³³(1894) 1 Q. B. 285.

³⁴Here the Lord Justice discussed *Guild v. Conrad* [1894] 2 Q. B. 885.

³⁵The italics are introduced by the present writer.

was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside of the section covers both ‘property cases’ and ‘del credere cases.’

“Can we then in the present case find any larger contract? I cannot. . . . And the mere fact that the defendant had, as he seems to have done, financed the syndicate to a large extent, and that that was his motive for coming forward and bargaining for forbearance, cannot make any difference in the object of the contract. That might have been the motive which induced him to make himself answerable for the debt of the syndicate; but it was not the object of the contract. The object was simply to obtain the forbearance of the creditors in respect of the debt.”

Here we have a frank recognition that certain promises which fall within the letter of the statute of frauds, being promises to answer for the debts of others, do not fall within the spirit and intention of the statute because they are part of a contract whose principal subject matter is something else—*e. g.*, the acquisition of certain property rights by the promisor from the promisee, or the creation of a certain business relation between them—the promise in question being introduced merely as a necessary incident to that principal subject matter. This principle covers the cases discussed above, where the promise to the creditor is in fulfilment of a duty already resting upon the promisor as the result of property received from the debtor, either in trust or absolutely, although the court does not discuss those cases.

It is not sufficient that the promisor hopes to obtain some benefit *as a result* of the contract in question. His object must be to accomplish something for himself *by force of* the contract, to which object the promise to answer for the debt of another is merely an incident. Such a rule is reasonably easy of application and does not tend to a general nullification of the statute. In fact Professor Henning argues that a promise under such circumstances is not within the original meaning of the statute,—that, where the promise to pay an amount owed by another is made upon the transfer to the promisor by the promisee of a property interest, this is not a “special promise” to answer for the debt of another, as that term was understood at the time the original statute of frauds was adopted. Being a promise, he says, to pay a sum certain upon receipt of property constituting *quid pro quo*, it created a debt,

which would not constitute a "special promise" supporting a special assumption, but would rather support an *indebitatus assumpsit*.³⁶

*Leonard v. Vredenburg*³⁷ was decided by the Supreme Court of New York in 1811. It appeared that Johnson had made the following writing: "November 9, 1808. For value received, I promise to pay Norman Leonard five hundred dollars, on sixty days from date, per me Moses Johnson." Defendant had added "I guaranty the above. Wm. I. Vredenburg." The court held that the defendant's promise made at the time credit was given to Johnson was within the statute of frauds, but that the consideration for defendant's promise could be inferred from the writing, so that the statute was satisfied. In the course of his opinion Kent, Ch. J., says that where the collateral undertaking is subsequent to the creation of the debt, some further consideration must be shown to make the promise binding, but that in such a case the promise falls within the statute of frauds. He says, however, that "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties", the case is not within the statute of frauds. This statement is based upon *Tomlinson v. Gill*³⁸ and *Williams v. Leper*³⁹ and *Roberts on Frauds*⁴⁰ where the statements of the rule were ambiguous. The words in quotations taken by themselves would seem to be no more than a statement of the law of contracts, that consideration must be a detriment to the promisee or a benefit to the promisor. If that were their meaning they would substantially nullify the statute in its application to all promises to answer for preëxisting debts of others. They have been the occasion of much confusion in subsequent cases in American jurisdictions.⁴¹

But since Kent declared that a promise to pay a preëxisting debt of another based upon "some further consideration shown" is within the statute of frauds, while a similar promise based upon "some new and original consideration of benefit or harm moving between the newly contracting parties", is not within the statute,

³⁶A New and Old Reading on the Fourth Section of the Statute of Frauds, 57 Univ. of Pa. Law Rev. and Amer. Law Reg. 611.

³⁷(1811) 8 Johns. 29.

³⁸(1756) Ambler 330.

³⁹(1766) 3 Burr. 1886, 2 Wils. 308.

⁴⁰Pp. 232 to 237.

⁴¹See Brandt, Suretyship (3rd ed.) § 80; 2 Cyc. 189; Throop, Validity of Verbal Contracts, §§ 145, 609; note in 22 L. R. A. (N. S.) 1077.

he could not have meant that every consideration of harm or detriment to the promisee, would take the promise out of the statute, but he probably meant that the harm to the promisee which would take the promise out of the statute must literally move to the promisor. If this is true, his requirement that there must be "consideration of benefit or harm moving between the newly contracting parties", means nothing more than that there must be *a benefit moving from the promisee to the promisor*.

This is the interpretation put upon Kent's statement in the very careful consideration of the subject by Comstock, Ch.J., in his prevailing opinion in *Mallory v. Gillet*,⁴² decided in 1860, where he declares Kent's meaning to be that "the consideration, whatever its nature, moves to the person making the promise."⁴³ Adopting, however, a suggestion of Savage, Ch.J., in *Farley v. Cleveland*,⁴⁴ Comstock declares that to the completeness of Kent's definition it is necessary "that the new and original consideration may move to the promisor as well from the debtor as the creditor, the fundamental requisite being that such consideration must not be one wholly existing or moving between the debtor and creditor."⁴⁵ In summing up, Comstock thus states the rule as he would define it for excluding promises from the statute: "Where, although the debt remains the promise is founded on a new consideration which moves to the promisor. The consideration may come from the debtor, as when he puts a fund in the hands of the promisee, [obviously promisor is meant], either by absolute transfer or upon a trust, to pay the debt, or it may be in his hands charged with the debt as a prior lien, as in the case of *Williams v. Leper*,⁴⁶ and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the promise to answer for the debt of another being one of the incidents of that dealing."⁴⁷ This rule is not very happily expressed,

⁴²(1860) 21 N. Y. 412.

⁴³*Ibid.*, at p. 419.

⁴⁴(N. Y. 1825) 4 Cow. 432, 439.

⁴⁵*Mallory v. Gillet* (1860) 21 N. Y. 412, 427.

⁴⁶*Ibid.*, at p. 433.

⁴⁷Four judges concurred with the Chief Judge. They held that the promise made in consideration of the surrender by the creditor of a lien to the debtor as within the statute. Bacon, J., wrote a dissenting opinion, concurred in by the two other judges. He held that "where the creditor, in consideration of the promise, surrenders some pledge, or relinquishes some lien actually held by him and capable of enforcement, and by means of which the original debt was rendered secure", the promise does not fall within the statute, even though the surrender be to the debtor. See footnote 27, *supra*.

for where the *debtor* puts a fund into the hands of the promisor for the payment of his debt, this is not the consideration for the promisor's subsequent promise to the creditor. But the force of the rule is clear, that a promise to pay the debt of another is not within the statute of frauds where it is made to obtain in exchange a benefit from the creditor, or where it is made to fulfil an obligation resulting from the antecedent receipt of property from the debtor.

A leading case decided a little earlier than *Mallory v. Gillet*, is that of *Nelson v. Boynton*,⁴⁸ in which Chief Justice Shaw delivered the opinion of the court. He goes to the heart of the matter in the following paragraph:⁴⁹

"The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own. The former whether made before, or after, or at the same time with the promise of the principal is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor."

The question before the court was as to whether a promise made to pay the debt of another, upon the creditor's agreeing to discontinue attachment proceedings brought against the property of the debtor was within the statute of frauds. The court held that the promise was within the statute saying⁵⁰ that "cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but when the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him it is within the statute."

Nelson v. Boynton and *Mallory v. Gillet* may fairly be considered the leading cases on this subject in the United States, and though the rule which is to govern is expressed differently in each of these cases, and also in *Harburg India Rubber Comb Co. v.*

⁴⁸ (Mass. 1841) 3 Metc. 396.

⁴⁹ *Ibid.*, at p. 400.

⁵⁰ *Ibid.*, at p. 402.

Martin,⁵¹ discussed above, the substance of the rule in each case is the same, and it is supported by the great weight of authority in this country.⁵²

In *Becker v. Torrance*⁵³ it was held without discussion, that a promise made by a debtor's assignee to pay a debt secured by a lien on property in the assignee's hands in consideration of the creditor's relinquishing the lien to the assignee, was not within the statute of frauds.

In *Pfeiffer v. Adler*⁵⁴ the facts were that the plaintiff had sold goods to the defendant's husband upon credit, for which the husband, at his death, owed plaintiff \$1,600. Defendant promised to pay the debt upon the plaintiff's promising to sell to her on credit so that she might carry on her husband's business. The court in a very short opinion said that, "The original demand was not extinguished by the arrangement, and there was no such new consideration as would suffice to take the case out of the statute of frauds. . . . A verbal promise to sell goods to a responsible party for their full value and on the usual terms forms no consideration for an independent engagement to pay the antecedent debt of a third person." The court relied upon *Mallory v. Gillet*, but in that case it was said, as pointed out above, that "the fundamental requisite being that such consideration must not be one wholly existing or moving between the debtor and the creditor"; and that consideration which will take a promise to answer for another's debt out of the statute "may originate in a new and independent dealing between the promisor and the creditor, the promise to answer for the debt of another being one of the incidents of that dealing."⁵⁵

⁵¹[1902] L. R. 1 K. B. 778.

⁵²See *Jones v. Walker* (1852) 13 B. Monroe 356; *Corkins v. Collins* (1868) 16 Mich. 478; *Runde v. Runde* (1871) 59 Ill. 98; *Weisel v. Spence* (1884) 59 Wis. 301, 18 N. W. 165; *Luark v. Malone* (1870) 34 Ind. 444; *Sext v. Geise* (1888) 80 Ga. 698, 6 S. E. 174; 22 L. R. A. (N. S.) 1077n and 40 L. R. A. (N. S.) 242n, containing large collections of cases.

⁵³(1864) 31 N. Y. 631, 642.

⁵⁴(1867) 37 N. Y. 164. Bockes and Grover, JJ., dissented without opinion.

⁵⁵In *Quintard v. DeWolf* (N. Y. 1861) 34 Barb. 97, 104, it was held under authority of *Mallory v. Gillet*, that where a contract between A and B for the manufacture of a machine is *rescinded*, and a contract is then made between A and C with the same subject matter, the contract between A and C is not within the statute. Under the same authority it was held in *Benedict v. Dunning* (N. Y. 1862) 1 Daly 241, that where plaintiff has negotiated a loan for A, but A does not take the money and defendant then agrees to take it and to pay accrued charges for plaintiff's expense and services, the promise is not within the statute. It is not said that the contract with A was rescinded and A discharged.

In 1868 the case of *Brown v. Weber*⁵⁶ was decided by the New York Court of Appeals. Defendant contracted with Horton to build a saw-mill, on defendant's land, and Horton, after the work was partly done, contracted with the plaintiff to finish it, Horton to furnish a portion of the material. Plaintiff became fearful that Horton could not pay for his services, and the defendant to induce him to finish the mill according to contract, promised him that if he would do so, defendant "would see that the plaintiff did not lose anything by it; he would see that the plaintiff got his pay, if the plaintiff furnished the mill according to contract". The plaintiff sued the defendant for the amount due to him under the contract. Defendant had judgment below on the ground that the promise was within the statute of frauds. In the Court of Appeals, in an opinion written by Grover, J., for a unanimous court, it was declared that the plaintiff could not recover on the facts shown in the case as he had not performed the contract as agreed. However, since the decision in the court below had been placed upon the statute of frauds, Grover, J., proceeded to examine the case from that point of view. His opinion is in part as follows:⁵⁷

"The principal cases were very elaborately reviewed and classified in *Mallory v. Gillet* (21 N. Y. 412). From these cases it appears that the courts have endeavored to establish certain rules by the application of which the case in judgment could be determined; but this has been attended with much embarrassment arising from the almost infinite variety of cases that have arisen; one test was the inquiry, whether the promise was original or collateral. This would be perfect if the term "original" is understood in all cases as applicable only to an absolute undertaking by the party promising to discharge an obligation of his own, not at all dependent upon performance or non-performance of any thing by another. The party is then himself the debtor, and must discharge the obligation, and it matters not whether some other is liable for the same thing or not. *The party promising is not discharged, although another may pay or perform, unless the other does it as his surety or by his procurement.* But this test is liable to mislead, as is shown in the case of *Mallory v. Gillet*, *supra*, if the term "original" is understood in the sense of new."

"Another test relied upon in many cases is, whether the consideration was new, not arising out of the existing obligation, and received by the party making the promise. Where this was the

⁵⁶(1868) 38 N. Y. 187.

⁵⁷*Ibid.*, at p. 190.

case, it was held, that the case was not within the statute, and these facts are cited as the reason why it is not. In most cases these facts will show whether the party promising contracted an independent obligation of his own, or whether his position to the creditor was that of a surety. The former case is not within the statute; the latter is. As an illustration, suppose A delivers property to B, in consideration of his promise to become surety to him for the payment of a debt owing to him by C: the case is within the statute, because B's obligation, although upon a consideration received by him, is that of surety only that C shall perform. Again, suppose that B, in consideration that A will discharge C of a debt owing to A, promises A that he will thereafter pay the whole or any part of such debt, the case is not within the statute, for the reason that B has contracted an independent debt of his own, and is in no sense surety to A for the performance of any thing by C, although he personally received no consideration for his promise. It will thus be seen that the receipt or non-receipt of the consideration by the party promising, does not determine in every case whether it is within the statute or not, but that the inquiry still remains whether he entered into an independent obligation of his own, or whether his responsibility was contingent upon the act of another. In the present case the argument of the plaintiff's counsel is, and the dissenting opinion proceeds upon the ground, that, because the mill was built upon the land of the defendant, and became his property when built, he received the consideration for the promise, and that, therefore, it is not within the statute. We have already seen that this does not determine the question."

The effect of this opinion, if it had been followed, would have been to simplify the law, and to confine to a very limited area, the exceptions to the literal application of the statute of frauds. In the first paragraph quoted it is said that it may be correct enough to say that "original" promises are not within the statute if by that term is meant obligations "not at all dependent upon performance or non-performance of anything by another" and of such a character that if another is obligated for the same thing and performs "the party promising is not discharged * * * unless the other does it as his surety or by his procurement". Can a promise to pay another's subsisting debt, however couched, satisfy that test for exclusion from the operation of the statute of frauds? It is perfectly possible for Jones to promise to pay Williams \$100 upon valid consideration, and for Smith to promise to pay Williams another \$100 also upon valid consideration. In that case Smith's promise is clearly not within the statute, and falls without the statute by Judge Grover's test, for it is not a promise to pay what

Jones owes, and Jones's payment will not discharge Smith. But if Jones owes Williams \$100, and Smith upon valid consideration promises Williams "to pay if Jones does not" or "to pay what Jones owes" or "to pay the \$100 which Jones has promised to pay", in each case the promise is to pay the debt of another. Under all circumstances where Smith makes such a promise, payment by Jones will discharge Smith. But are there circumstances where Smith makes such a promise, and where Jones's payment will, therefore, discharge Smith, and yet where Jones's payment is substantially as surety for Smith, so that Smith's promise is without the statute according to Judge Grover's test? It is believed that such is true where Jones transfers property or funds to Smith in exchange for the latter's promise to pay Jones's debt himself or out of the property or funds transferred, and Smith later promises the creditor to pay him upon any valuable consideration moving from the creditor. In such a case if Smith pays he is not entitled to reimbursement from Jones, as would be true if Jones stood in the ordinary position of principal to Smith; and on the other hand, if Jones has to pay he is entitled to recover from Smith—his action to be sure would not be on an implied or express contract of reimbursement, but for breach of Smith's contract to pay the creditor, yet his recovery would be the same as if his action were for reimbursement. So, under the circumstances stated, Jones, if he pays, pays substantially as Smith's surety.

The case suggested in the second quoted paragraph as not being within the statute is a case of novation, where the original debtor is discharged and the promisor takes his place. As we have seen above, this is clearly not a promise to answer for the debt of another, since the other's debt ceases to exist at the time the promise in question is made. The court suggests one other case that would not be within the statute—viz., if the defendant notwithstanding his previous contract with Horton had made "an independent contract with the plaintiff for doing the same job, and to pay him therefor"; by which the court means that if, the contracts between defendant and Horton, and Horton and plaintiff having been terminated, defendant and plaintiff had then contracted for the same subject matter, the contract would not have fallen within the statute, as clearly it would not; but the court held that the plaintiff continued to perform under the contract with Horton, and so defendant's promise that plaintiff should be paid was a promise to answer for Horton's debt.

The fact that the consideration for defendant's promise was a benefit to himself in having plaintiff finish the mill on defendant's land was insisted upon by plaintiff's counsel as taking the case out of the statute, but the court said that "this does not determine the question". The court contrasted the case of a novation, which is not within the statute, with the case where "A delivers property to B, in consideration of his promise to become surety to him for the payment of a debt owing to him by C", and says "the case is within the statute, because B's obligation, although upon a consideration received by him, is that of surety only that C shall perform"; and the court concludes that "the receipt or non-receipt of the consideration by the party promising does not determine in every case whether it is within the statute or not, but * * * the inquiry still remains whether he entered into an independent obligation of his own, or whether his obligation was contingent upon the act of another".

It is clear that the case sets forth a new test—a test to the effect that every promise to answer for a debt must be in writing when another is liable for the same debt, and payment by that other would discharge the promisor, except when that other is himself really surety for the promisor, and, therefore, upon payment could recover from the latter. This test is clearly and intentionally a different one from that laid down in *Mallory v. Gillet*, discussed at length above.⁵⁸

In two Supreme Court cases between 1868 and 1888 *Brown v. Weber* was relied upon to support a decision that a promise to answer for the subsisting debt of another is within the statute of frauds, though made in consideration of a benefit moving from the creditor to the promisor.⁵⁹ On the other hand the case of *Saunders v. Gillespie*⁶⁰ seems not to be consistent with *Brown v. Weber*. In the former case the facts were that the plaintiff was first indorser and defendant second indorser on a note. Defendant promised plaintiff that if he would pay the note the defendant would repay the plaintiff in goods. This would seem to have been a promise to pay the maker's debt, yet the promise was held not to

⁵⁸It is rather curious that in the preceding year Grover, J., dissented from the opinion of the majority in *Pfeiffer v. Adler* (1867) 37 N. Y. 164, which held a promise to answer for the debt of another upon consideration moving to promisor was within the statute.

⁵⁹*Rawson v. Springsteen* (N. Y. 1873) 2 Thomp. & C. 416; *Weyer v. Beach* (N. Y. 1878) 14 Hun 231, 237.

⁶⁰(1874) 59 N. Y. 250, 252.

be within the statute. The court cited *Leonard v. Vredenburg*, *Mallory v. Gillet* and *Brown v. Weber*, but quoted as the test the language of Kent in the first of the cases, that to take a case out of the statute there must be "some new and original consideration of benefit or harm moving between the newly contracting parties".⁶¹

In 1888 Judge Finch again reviewed the subject in *White v. Rintoul*,⁶² and declared that the doctrine existing in the state had been arrived at in three stages. The first stage was reached when Kent, Ch. J., laid down his test in *Leonard v. Vredenburg*; the second stage was reached when Comstock, Ch. J., laid down his test in *Mallory v. Gillet*, which differed from that of Kent; and the third stage was reached when Grover, J., laid down his test in *Brown v. Weber*, which "narrowed and restricted" the test of Comstock, and which was explained in *Ackley v. Parmenter*.⁶³ Judge Finch declared that the rule finally arrived at might be stated as follows:⁶⁴ "*that where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.*" We have seen that Grover, J., held that if the pre-existing debt of *A* continues, defendant's promise must be so "independent" that the payment by *A* would not discharge defendant, unless in some way *A* has become defendant's surety. We have also seen that Grover, J., intended to lay down a test different from that in *Mallory v. Gillet*. Judge Finch tries to combine both tests. If he means, as he says he does, to adopt Grover's test, the result is as follows: where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it

⁶¹In *Duffy v. Wunsch* (1870) 42 N. Y. 243, the consideration for the defendant's promise moved to the debtor, and the case was held to fall within the statute. In *Booth v. Eighmie* (1875) 60 N. Y. 238, there was a novation, and the case was held not to fall within the statute. In *Tallman v. Bresler* (N. Y. 1873) 65 Barb. 369, 379, and *Kessler v. Sonneborn* (N. Y. 1882) 10 Daly 383, plaintiff's contract to supply material or services to *A* had been in each case rescinded and a new contract made between plaintiff and defendant, which contract was held not to be within the statute.

⁶²(1888) 108 N. Y. 222, 15 N. E. 318.

⁶³(1885) 98 N. Y. 425, discussed above, where it is pointed out that according to this case a promise to pay another's debt upon receipt of property from that other is still within the statute of frauds unless the property has been realized upon at the time that the promise is made to the creditor.

⁶⁴(1888) 108 N. Y. 222, 227, 15 N. E. 318.

was made upon any valid consideration, if it is in fulfilment of a contract with the debtor based upon such beneficial consideration from the debtor, that, as between the debtor and the promisor, the debtor stands really in the position of surety.

The facts of the case were that a firm of W. & R. became indebted to the plaintiff on two notes. Before either matured "defendant requested the plaintiff to forbear any effort at their collection until June or July 1881 [several months after they would fall due], promising, if the plaintiff would do so, to pay the amount of the notes." Defendant was the father of one member of the debtor firm, and was himself a creditor of the firm. It was claimed that the purpose of the promise was to save the promisor from loss as a firm creditor and so to benefit himself. Judge Finch examines the contention at length and finally concludes that as the defendant was a secured creditor it does not appear that the promise would benefit him. He does not apply Judge Grover's test, which he purports to adopt, and declare that since the firm still remained liable and their payment of the debt would discharge defendant, and such payment would not be as surety, defendant's promise was not "independent". The court looked rather to see if the promisor was benefited by the consideration for the promise, and did not even restrict its inquiry to the question whether the promisor was to get something directly beneficial to himself under the contract, but searched carefully to see if he would get any incidental or indirect benefit.

What has Judge Finch's test been interpreted to mean by the New York courts in later cases? Does it mean that the promise to be without the statute of frauds must literally create "an *independent* duty of payment *irrespective* of the liability of the principal debtor", as it declares, and as the term is used by Grover, J., in *Brown v. Weber*? Or is its meaning the same as that of the test enunciated in *Mallory v. Gillet*?

In *First National Bank v. Chalmers*⁶⁵ a debtor transferred property to the defendant in exchange for defendant's promise to pay transferor's creditor, and the defendant later promised the creditor to pay him. Judge Finch, writing for a unanimous court, held that at least such a case fell without the statute of frauds under the authority of *White v. Rintoul*, because the defendant made the debt his own by the receipt of the property, and had

⁶⁵(1895) 144 N. Y. 432, 39 N. E. 331.

become primarily liable, the original debtor being practically a surety entitled to require payment by the defendant. In *Clark v. Howard*⁶⁶ the question was not on the statute of frauds, for the action was by the creditor as beneficiary on a written contract between defendant and the debtor, but the question was whether a creditor could recover on a promise that the defendant would pay the debtor's debt in consideration of property transferred to him by the debtor. However, the court declared that the promise to the creditor under such circumstances would not be within the statute of frauds because of the property received by the defendant.⁶⁷

In *Raabe v. Squier*⁶⁸ the plaintiffs contracted with builders to furnish certain material, payment to be made in installments. Two installments of the payment being overdue, the plaintiffs refused to perform further until paid what was already due. Then "Jenks and Starkes saw plaintiffs and told them that they were the owners of the buildings; that they wanted them finished and that if the plaintiffs would go ahead and deliver the rest of the material they would see them paid therefor; that if Squier and Whipple did not pay they would take it out of the amount going to them and would pay the plaintiffs". Relying upon the promise the plaintiffs delivered the rest of the material, and the action was for the balance due. On behalf of Jenks and Starkes the statute of frauds was set up. The court said: "The promisors were the owners of the buildings in the process of construction. The woodwork furnished by the plaintiff was for their benefit. The contractors had neglected to pay the plaintiffs for the material furnished and they refused to deliver more, as they had the right to do. Under such circumstances the promise was made, and it was in reliance upon the promise that the plaintiff delivered the rest of the woodwork. The promise thus made was original and founded upon a new consideration, that of the goods. It was beneficial, as we have seen, to the promisors, thus bringing the case within the rule stated by Finch, J., in *White v. Rintoul*". Here, for the first time since *White v. Rintoul*, did the Court of Appeals have presented to it for decision under the statute of frauds a case

⁶⁶(1896) 150 N. Y. 232, 44 N. E. 695.

⁶⁷*Tighe v. Morrison* (1889) 116 N. Y. 263, 22 N. E. 164, is a case of indemnity as discussed above, and the promise, therefore, did not fall within the statute.

⁶⁸(1895) 148 N. Y. 81, 42 N. E. 516.

where a person promised to pay a debt, for which another was concurrently liable, the promise being made wholly in consideration of a benefit moving from the *creditor* to the promisor in exchange for the promise, and beneficial to the promisor. Here payment by the original debtors would have discharged the promisors, and the original debtors so paying would not have paid substantially as sureties for the promisors, with a right of action against such promisors as the result of such payment. The promisors' position, then, was not such that they came "under an independent duty of payment irrespective of liability of the principal debtor" as required by Grover, J., in *Brown v. Weber*; but nevertheless the promisors' obligation was held to fall without the statute of frauds by the application of the test laid down in *Mallory v. Gillet*, namely, that the promise is not within the statute "where, although the debt remains, the promise is founded on a new consideration which moves to the promisor". And the Court of Appeals in *Raabe v. Squier*, after applying that test to the case in hand, and holding that the promise did not fall within the statute, quoted the test of Finch, J., in *White v. Rintoul*, set forth above, as synonymous with that in *Mallory v. Gillet*. By force of this case New York would seem to have been brought back to the law as laid down in *Mallory v. Gillet*, and as also laid down in the English case of *Harburg India Rubber Comb Co. v. Martin*, and the Massachusetts case of *Nelson v. Boynton*, discussed earlier in this article.

Five years later the case of *Lamkin v. Palmer*⁶⁹ came before the Court of Appeals. Plaintiff an employee and stockholder had loaned money to a corporation, part of whose debts defendant had become obligated to pay. Defendant had obtained an offer for the purchase of a certain part of the corporation's property and was attempting to get the consent of the stockholders to the sale to the defendant of certain of its property so that he could make the sale to the third person. In order to induce the plaintiff to sign the consent, defendant orally promised to pay plaintiff's claim out of the proceeds of the sale which he was to make to the third person. The defendant set up the statute of frauds, which the Court of Appeals briefly disposed of in these words: "If there was a new and distinct consideration moving to the defendant and beneficial to him, the promise to pay was not within the statute (*Leonard v.*

⁶⁹(1900) 164 N. Y. 201, 50 N. E. 123.

Vredenburg, 8 Johnson 29, 30; *Raabe v. Squier*, 148 N. Y. 81).” The court determined that the consideration was beneficial to defendant, and that the statute of frauds was, therefore, not a defense.

In the lower New York Courts the case of *White v. Rintoul* has certainly not been interpreted as requiring that a promise to pay a subsisting debt of another to fall without the statute must be in fulfilment of a promise to the debtor, based upon the receipt of property or funds from the debtor so that the debtor is substantially a surety for the promisor. There is the most meagre and inconclusive support for such an interpretation.⁷⁰ In almost every instance the test has been put in the form in which it was laid down in *Mallory v. Gillet*—a promise based upon a new consideration moving to the promisor and beneficial to him—and *White v. Rintoul*

⁷⁰In *Lachman v. Irish* (1893) 72 Hun 491, 25 N. Y. S. 193, the court said, “It does not appear that the defendant’s promise was founded upon any consideration moving to him creating an obligation in discharge of which he promised to pay those existing debts”, of A. This test was deduced from *White v. Rintoul*. In *Mutual Life Ins. Co. v. Hall* (1898) 31 App. Div. 574, 52 N. Y. Supp. 404, the question was whether the discharge of the principal debtor discharged the surety, when as between the debtor and the surety, the surety had become primarily liable through the transfer of property to him. The court held that the surety was not discharged, and pointed out that under the doctrine of *White v. Rintoul* an oral contract of suretyship under similar circumstances would not be within the statute of frauds. In *Mechanics and Traders Bank v. Stettheimer* (1906) 116 App. Div. 198, 101 N. Y. Supp. 513, plaintiff discounted a note of a corporation and allowed it to overdraw upon defendant’s and others’ promise to “guaranty their proportionate share”. The court considered *Mallory v. Gillet*, *Brown v. Weber* and *White v. Rintoul*, and concluding that “the liability of the promisor must in each case be determined by the nature of the promise, whether it was to answer for the debt of a third person or whether it was to answer for his own debt”, decided that defendant’s promise was within the statute of frauds. In *Sternwald v. Siegel* (1894) 7 Misc. 70, 27 N. Y. Supp. 375, *King v. Isreal* (1897) 19 Misc. 159, 43 N. Y. Supp. 306, and *Lyon v. Clochessy* (1904) 43 Misc. 67, 84 N. Y. Supp. 245, a third person had in each case received property from the debtor in consequence of which he orally promised to pay the debt; in the first of the cases the court said that the promise was enforceable “as an original one, made upon an independent consideration, beneficial to him, and devolving the obligation to pay the demands as agreed”, citing *White v. Rintoul*; in the second case recovery was allowed on the authority of *White v. Rintoul* without much discussion; and in the third case the liability of the promisor was recognized upon authority of *White v. Rintoul* and *First Nat’l. Bank v. Chalmers*, discussed above. In *Habeeb v. Mamary* (1918) 103 Misc. 503, 170 N. Y. Supp. 468, defendant having promised to pay his brother’s debt to prevent his brother being sued, because such suit would have hurt defendant’s business, the court, after quoting from *White v. Rintoul*, declared that the question was “Whether the agreement was an original and absolute one to pay the debt in question, or collateral only”, and held it was collateral.

has been frequently cited and the language of Judge Finch quoted as expressive merely of the same proposition.⁷¹

In a considerable number of the later New York cases the question has arisen where a subcontractor has refused to continue work on a building unless the defendant would promise to pay or see him paid. Where the defendant was owner of the premises the courts have almost uniformly held that he is to receive sufficient direct benefit to take the case out of the statute.⁷² Where he was mortgagee of the premises there is less unanimity as to the directness and sufficiency of his benefit,⁷³ but since the mortgagee's security is increased, he would seem to receive a direct benefit under the contract. The fact that the promisor was a creditor of the debtor, and might, therefore, be indirectly benefited by a benefit which moves from the creditor to the debtor in consideration of the promise, should not be held sufficient to take the promise out of the statute of frauds,⁷⁴ for to take the promise out of the statute

⁷¹*Jones v. Bacon* (1893) 72 Hun 506, 25 N. Y. Supp. 212.; *Merserau v. Washburn* (1896) 6 App. Div. 404, 39 N. Y. Supp. 664; *Alley v. Turk* (1896) 8 App. Div. 50, 40 N. Y. Supp. 433; *Millard v. Steers* (1896) 9 App. Div. 419, 41 N. Y. Supp. 321; *Almond v. Hart* (1899) 46 App. Div. 431, 61 N. Y. Supp. 849; *Mannetti v. Doege* (1900) 48 App. Div. 567, 62 N. Y. Supp. 918; *Becker v. Krank* (1901) 62 App. Div. 514, 71 N. Y. Supp. 78; *Schild v. Eckstein Brewing Co.* (1905) 108 App. Div. 50, 95 N. Y. Supp. 493; *Schwoerer & Sons v. Stone* (1909) 130 App. Div. 796, 115 N. Y. Supp. 440; *R. & L. Co. v. Metz* (1914) 165 App. Div. 533, 150 N. Y. Supp. 343; *Perry v. Erbe* (1898) 23 Misc. 105, 50 N. Y. Supp. 714; (in this case the statute of frauds was erroneously held to apply to a promise made to the debtor and sued upon by the debtor); *Mitchell v. Miller* (1898) 5 Misc. 179, 54 N. Y. Supp. 180; *Brumm v. Gilbert* (1899) 27 Misc. 421, 59 N. Y. Supp. 237; *Lippman v. Blumenthal* (1899) 29 Misc. 335, 60 N. Y. Supp. 510; *Boeff v. Rosenthal* (1902) 37 Misc. 852, 76 N. Y. Supp. 988; *Stromberg v. Loiacono* (1904) 45 Misc. 651, 91 N. Y. Supp. 46 (promise held not within the statute because based upon a new consideration of benefit to the defendant "and was for the payment of less than \$50."); *Breen v. Isaacs* (1905) 49 Misc. 127, 96 N. Y. Supp. 741; *Schnauffer v. Ahr* (1907) 53 Misc. 299, 103 N. Y. Supp. 195; *Cardeza v. Bishop* (1900) 54 App. Div. 116, 66 N. Y. Supp. 408; *Sinkovitz v. Applebaum* (1907) 56 Misc. 527, 107 N. Y. Supp. 122; *Cooper & Polak S. I. Works v. Rosing* (1914) 85 Misc. 409, 147 N. Y. Supp. 241; *Eno v. Gidoney* (1915) 154 N. Y. Supp. 104; *Hudson W. & L. Co. v. Aldrich* (1916) 94 Misc. 250, 157 N. Y. Supp. 1046. A number of the later cases rely also upon *Raabe v. Squier*, discussed above.

⁷²*Raabe v. Squier* (1895) 148 N. Y. 81, 42 N. E. 516; *Almond v. Hart*, *Ibid.*; *Mannetti v. Doege*, *Ibid.*; *Schild v. Eckstein Brewing Co.*, *Ibid.*; *Boeff v. Rosenthal*, *Ibid.*; *Stromberg v. Loiacono*, *Ibid.*; *Schnauffer v. Ahr*, *Ibid.* *Contra* *McRoberts v. Matthews* (1897) 18 App. Div. 624, 45 N. Y. Supp. 431.

⁷³For recovery; *Merserau v. Washburn*, *Ibid.*; *Boeff v. Rosenthal*, *Ibid.*; *cf.* *Schwoerer and Sons v. Stone*, *Ibid.* Against recovery: *Hudson W. & L. Co. v. Aldrich* (1916) 94 Misc. 250, 157 N. Y. Supp. 1045.

⁷⁴*Millard v. Steers* (1896) 9 App. Div. 404, 36 N. Y. Supp. 664.

the benefit to the promisor should be the main subject matter of the contract—the promisor should acquire a benefit by force of the contract.⁷⁶ Yet the lower New York courts have not applied the principle with care and accuracy. In one case the facts that defendant was a surety of a builder, and held an assignment of the builder's right to payment under his contract, were held to take his promise to pay the builder's debt out of the statute, when made in consideration of the creditor's agreement not to file a lien on the premises.⁷⁶ And in another case the facts that the defendant had some financial interest in a contracting concern, and was president of a corporation which held a mortgage on the property where the contracting concern was operating, were held to take his promise to pay the builder's debt to a subcontractor out of the statute, when made in consideration of the subcontractor's withdrawing his decision to discontinue performance under his contract.⁷⁷ On the other hand in a case where plaintiff had supplied goods to a person who, had later died, and agreed to continue to supply similar goods to the deceased's widow so that she could carry on the business, in consideration of her promising to pay the debt due from her husband's estate, the widow's promise was held to be within the statute, there being in the court's opinion no sufficient direct benefit to the promisor.⁷⁸

The recent case of *Richardson Press v. Albright*⁷⁹ has again brought the New York law into doubt. Defendant was a large stockholder in the Oceanic Publishing Company which was publishing a magazine entitled "Dogs of America", printed by plaintiff. The company being indebted to the extent of \$3,000 to plaintiff, plaintiff's representative and defendant had a conference, and the testimony of plaintiff's representation was as follows: "We discussed the thing generally, and he said, 'Well, you can't expect me to pay all this'. He says, 'I will agree to pay you \$1,500, in three payments, \$500 weekly. I will further agree to pay each issue hereafter in cash, before you send it out'." The court said that, assuming the defendant was speaking for himself and not for the pub-

⁷⁶See the excellent statement in *Harburg India Rubber Comb. Co. v. Martin* [1902] C. R. 1, K. B. 778.

⁷⁷*Alley v. Turk* (1896) 8 App. Div. 50, 40 N. Y. Supp. 321.

⁷⁸*Schworer & Sons v. Stone* (1909) 130 App. Div. 796, 115 N. Y. Supp. 440.

⁷⁹*Cardeza v. Bishop* (1900) 54 App. Div. 116, 66 N. Y. Supp. 408. To the same effect is *Pfeiffer v. Adler*.

⁸⁰(1918) 224 N. Y. 497, 121 N. E. 362.

lishing company, there were some elements of an enforceable promise. Defendant was largely interested in the publishing company, and said that he had taken control of it. "Thus the element of a new consideration moving to him was present. But his beneficial interest was at best remote. Unquestionably the principal debt was not extinguished and credit was still given and to be given to the Oceanic Publishing Company. On this evidence it is urged that defendant became a primary debtor with the Oceanic Publishing Company * * * and that the plaintiff was entitled to recover." The court continues:

"But a promise may still be collateral, even though the new consideration moves to the promisor and is beneficial to him. The elements of beneficial interest and new consideration must be present to take the case out of the statute, *but the inquiry remains whether the consideration is such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor*⁸⁰ (*White v. Rintoul, supra*, at page 227). The implied consideration, as indicated by the subsequent dealings of the parties, is that the plaintiff will continue to give credit primarily to Oceanic Publishing Company. * * * The tenor of the entire transaction was that the defendant purposed to help out the Oceanic Company and verbally promised to pay its debts.

"When the primary debt continues to exist, the promise of another to pay the debt may be original or it may not be, *but it is regarded as original only when the party sought to be charged becomes, within the intention of the parties, a principal debtor primarily liable.*⁸⁰ If we pick a few phrases from the context we may draw the conclusion that the defendant intended to assume such a relation to plaintiff, but on all the evidence we find but one principal primary debtor and that is the Oceanic Publishing Company. The ancient purpose of the statute of frauds was to require satisfactory evidence of a promise to answer for the debt of another person and its efficacy should not be wasted by unsubstantial verbal distinctions."

It is believed that the benefit to the promisor in *Richardson Press v. Albright* was not such a benefit moving directly to him under the contract, in exchange for his promise, as to properly take the promise out of the statute under the rule laid down in *Mallory v. Gillet*, and the court points out that the promisor's beneficial interest "was at best remote", but the courts decision is not put on that ground. In fact the court seems clearly not to accept or approve of the test laid down in *Mallory v. Gillet* for it says

⁸⁰The italics are those of the present writer.

that "a promise may still be collateral, even though the new consideration moves to the promisor and is beneficial to him."

By insisting that the promisor must come "under an independent duty of payment, irrespective of the liability of the principal debtor", and that he must clearly become "within the intention of the parties, a principal debtor primarily liable", does the court mean to return to the doctrine of *Brown v. Weber*, explained above, which was apparently approved in *White v. Rintoul*, but which has been consistently ignored in later cases, in favor of the more liberal rule in *Mallory v. Gillet*? Or would the court take some middle ground between the two?

It has been suggested that, since the decision in *White v. Rintoul*, "when a new, beneficial consideration is shown, the whole matter turns upon the question whether the promise can be interpreted as 'I will pay you', or 'I will pay you if he does not'", and that *Richardson Press v. Albright* was decided on this principal.⁸¹ In the first place it is believed that this distinction is not supported by the cases. In most of the cases since *White v. Rintoul* it either does not appear what the form of the promise was or else the promise was in the form "I will pay",⁸² but in none of such cases does the decision turn upon the form of words used; it turns instead upon the question whether the promise was made in exchange for a benefit, or whether the promisor had become the principal debtor in the sense in which that requirement was laid down in *Brown v. Weber*. It is believed that the only cases which might be considered as supporting the above quoted proposition are *McRoberts v. Matthews*,⁸³ *Almond v. Hart*⁸⁴ and *Mechanics and Traders Bank v. Stettheimer*.⁸⁵ In them stress seems to have been laid on the question whether the word "guaranty" was used or not. On the other hand in *Raabe v. Squier*⁸⁶ the Court of Appeals had under consideration a case where the promisor said that "if the plaintiffs would go ahead and deliver the rest of the material they would see them paid therefor; that if Squier and Whipple did not pay they would take it out of the amount going to them and would pay the

⁸¹Note in 2 Cornell Law Quar. 209, and 4 Cornell Law Quar. 60, by F. S. Reese, Jr., now professor in the Dickinson School of Law.

⁸²See the cases collected in footnotes 71 and 72, *supra*.

⁸³(1897) 18 App. Div. 624, 45 N. Y. Supp. 431.

⁸⁴(1899) 46 App. Div. 431, 61 N. Y. Supp. 849.

⁸⁵(1906) 116 App. Div. 198, 101 N. Y. Supp. 513.

⁸⁶(1895) 148 N. Y. 81, 42 N. E. 516.

plaintiffs"; and the court held the promise was not within the statute. In the *R. & L. Co. v. Metz*⁸⁷ the court, commenting on the last case, said, "In *Raabe v. Squier* it was held that an agreement by a party interested in having another perform a contract, to *guarantee*⁸⁸ payment, and to pay if the party to whom the materials were furnished and delivered 'would not', was not within the statute." In *Brunn v. Gilbert*⁸⁹ action was on a written guaranty. The writing did not satisfy the statute because no consideration appeared from it. It, therefore, had to be decided whether the promise itself was within the statute. The words were "I guarantee the new account of * * * my husband", and in the writing a provision was made for the manner of payment by the defendant if her husband could not pay. Yet the court's decision did not at all go upon the form of the words used in the promise, but upon the fact that the consideration for the promise was not beneficial to the promisor. And finally in the case of *Richardson Press v. Albright* the defendant said "I will pay you", and yet the Court of Appeals held that the promise was within the statute.

There seems no reasonable basis for holding that, when beneficial consideration moves to the promisor, the question whether the statute applies should turn upon the inquiry whether he said in substance "I will pay you", or "I will pay you if he does not." In both cases, if the promisor is to pay that which another owes, it is a promise to answer for the debt of another, and, therefore, within the language of the statute. In one case as much as in the other the payment by the principal debtor will discharge the promisor. Neither in one case more than in the other does the form of the promise determine the question, between the promisor and the debtor, as to who is really principal and who is really surety. This will be determined by their separate agreement, and the consideration which has passed between them. In one case as much as in the other the promise may be merely incidental to a primary subject matter—the acquisition of something beneficial to the promisor. The only difference between a promise in the form "I will pay" and the promise in the form "I will pay if he does not", is that in suing upon the former the promisee has only to allege and prove the promise and its nonfulfilment, and payment by the principal is

⁸⁷(1914) 165 App. Div. 533, 537, 150 N. Y. Supp. 843.

⁸⁸The italics are those of the court.

⁸⁹(1899) 27 Misc. 421, 59 N. Y. Supp. 237.

an affirmative defense, while in suing upon the latter the promisee must not only allege and prove the defendant's promise and its nonfulfilment but must also allege and prove nonpayment by the principal.

The New York Court of Appeals must finally adopt one of two positions—either that of *Mallory v. Gillet*, *Raabe v. Squier* and *Lambkin v. Palmer* and the great majority of decisions in the lower courts, or that of *Brown v. Weber*, apparently approved in *White v. Rintoul* and perhaps intended to be followed in *Richardson Press v. Albright*. We can afford to restate those positions. That of *Mallory v. Gillet* is that a promise to pay the debt of another is not within the statute of frauds if made to obtain a direct beneficial consideration from the creditor, or if made in fulfilment of an obligation to the debtor based upon property transferred by the debtor to the promisor. That of *Brown v. Weber* is that a promise to pay the subsisting debt of another is taken out of the statute only when, as between the promisor and the original debtor, the promisor has become primarily liable and the original debtor has become only secondarily liable.

The position taken in *Brown v. Weber* is reasonably simple and easy of application, and is an attempt at a literal interpretation of the statute. It amounts to this,—that no promise which is *in effect* a promise to pay the debt of another shall be held to fall without the statute.⁹⁰

The doctrine of *Mallory v. Gillet*, reapplied in *Raabe v. Squier* and *Lambkin v. Rabnier*, frankly applies what the court conceived to be the spirit of the statute. It looks to the purpose of the promise rather than to its form. It holds that the statute was aimed at promises directly for the benefit of the debtor, and that the proof of direct benefits to the promisor in exchange for the promise, or proof of benefit antecedently received from the debtor which induced the promise, is sufficient corroboration to put the promise outside the danger of fraudulent proof of parol promises aimed at by the statute. This doctrine is that which has been arrived at in England⁹¹ and is that which is most generally accepted in the United States.

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⁹⁰Though it would be hard to square the decisions as to the *del credere* agencies with this doctrine.

⁹¹*Harburg India Rubber Comb. Co. v. Martin* [1902] L. R. 1 K. B. 778.